

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

JOHN A. SCHORR, JR.,
Appellant,

v.

DEPARTMENT OF THE NAVY,
Agency.

DOCKET NUMBER
SF-0752-98-0204-I-1

DATE: SEP 28 1998

John A. Schorr, Jr., Stockton, California, pro se.

Michael Russell, Lemoore, California, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 The appellant petitions for review of an initial decision issued on February 17, 1998 that dismissed his appeal as untimely filed. For the reasons discussed below, we GRANT his petition, VACATE the initial decision, and REMAND the appeal to the regional office for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant resigned on June 30, 1997 from his position of Library Technician (GS-7) at the Naval Air Station in Lemoore, California. Initial Appeal File (IAF), Vol. 2, Tab 4A. He attached an addendum to his resignation, in which

he enumerated why he believed that his resignation was involuntary. *Id.* On November 21, 1997, he filed an appeal alleging that his resignation had been coerced by the agency. *See* IAF, Vol. 1, Tab 1. In his acknowledgment order, the administrative judge notified the appellant that the appeal appeared to be untimely filed, that he had the burden of proof on this issue, and that he should submit evidence and argument to show that his appeal was timely filed, or that good cause existed for the filing delay. *See id.*, Tab 2.

¶3 In response to the acknowledgment order, the appellant filed a statement claiming that the filing was delayed because he had been physically and mentally incapacitated by the agency's actions and had been advised by a physician to "let all job-related matters wait until his health had improved." *See id.*, Tab 3. No medical evidence or documentation was submitted to support this allegation. He also asserted that the agency had not advised him of his appeal rights. *Id.* He claimed that he had filed his appeal as soon as he had "regained his mental and physical health." *Id.* The agency moved to dismiss the appeal on the grounds of untimeliness and lack of jurisdiction. IAF, Vol. 2, Tab 1.

¶4 The administrative judge subsequently dismissed the appeal as untimely filed, with no good cause shown for the delay. *See* Initial Decision at 4-5, IAF, Vol. 1, Tab 10. He specifically found that the appellant's assertion that he was unable to timely file the appeal because he had been under a physician's care for job-related stress was unsupported by any medical documentation or other evidence. *Id.* at 4. He further found that the appellant had failed to show that he had exercised reasonable prudence or due diligence in notifying the agency of his current address and had failed to demonstrate good cause for the four-month delay in filing his appeal. *Id.*

¶5 The appellant has now petitioned for review, again arguing that the delay in filing was due to his mental condition and that the agency failed to notify him of

his appeal rights. Petition for Review (PFR) File, Tab 1. The agency has responded in opposition to the appellant's petition. *Id.*, Tab 3.

ANALYSIS

¶6 An employee-initiated action, such as a resignation, is presumed to be a voluntary action and, thus, is not appealable to the Board. *See, e.g., West v. U.S. Postal Service*, 44 M.S.P.R. 551, 561 (1990). *See also* 5 C.F.R. §§ 715.201-.202. Consequently, an employee is not entitled to notice of appeal rights from such an action. *See, e.g., Gaynor v. U.S. Postal Service*, 43 M.S.P.R. 481, 484 (1990). However, if an employee notifies his agency that, contrary to the presumption, he considered his action to have been involuntary, or if the circumstances show that the agency was, or reasonably should have been, aware of facts indicating that it was involuntary, the employee is entitled to notice of appeal rights. The agency's failure to provide a required notice excuses a delayed appeal. *See Krizman v. U.S. Postal Service*, 66 M.S.P.R. 233, 236 (1995), *aff'd*, 77 F.3d 434 (Fed. Cir. 1996).

¶7 In this case, the appellant notified the agency in the addendum to his resignation that he considered it to be involuntary. *See* IAF, Vol. 1, Tab 3A. The record reflects that the agency mailed the appellant a July 9, 1997 letter explaining his available options, including notice that if he felt that his resignation had been involuntary, he could appeal it to the Board within thirty days from the date of his June 30, 1997 resignation. *See* IAF, Vol. 2, Tab 4D. The notice was sent to the address provided by the appellant in his resignation letter, and it was returned by the Postal Service with a notation that there was no forwarding address. *Id.* On July 11, 1997, the agency sent a second notice letter to what it believed to be his then-current address. *Id.* The second notice letter was not returned as undeliverable.

¶8 While the appellant claimed that he never received the notice letters, he did not submit any evidence, in his appeal or on review, showing that he had notified

the agency of his address change, nor did he assert that his alleged illness had prevented him from providing such notice. The Board has held that service on an appellant at the last address of record is proper, that it is his responsibility to keep the agency apprised of changes in his address, and that a delay is not excused when he fails to provide the agency with a change of address and, for that reason, does not timely receive information regarding the time limits for filing an appeal. *See Cunningham v. Department of Transportation*, 35 M.S.P.R. 674, 677 (1987). Thus, we find that the agency satisfied its duty to notify the appellant of his appeal rights when it sent the first notice to his last address of record and that the delay is not excused, even if he never received either notice letter, because he failed to provide the agency with his change of address.

¶9 A petition for appeal must be filed within 30 days after the effective date of the action being appealed, and this time limit may be waived only upon showing of good cause for the delay in filing. *See* 5 C.F.R. §§ 1201.12, 1201.22(b), (c). Here, the appellant's petition was filed approximately four months after the 30-day time period had elapsed from his June 30, 1997 resignation. *See* IAF, Vol. 1, Tab 1. Therefore, the appellant has the burden of showing that he acted with due diligence under the circumstances of the case, or that the delay was due to circumstances beyond his control. *Alonzo v. Department of the Air Force*, 4 M.S.P.R. 180, 184 (1980).

¶10 The Board will find good cause for waiver of its filing time limits where a party demonstrates that he exercised due diligence or ordinary prudence under the particular circumstances of the case. *See id.* To determine whether the appellant has shown good cause, the Board will consider the length of the delay, the reasonableness of his excuse and his showing of due diligence, whether he was proceeding pro se, and whether he has presented evidence of the existence of circumstances beyond his control, unavoidable casualty, or misfortune that affected his ability to comply with the time limits. *Id.*

¶11 Furthermore, in *Lacy v. Department of the Navy*, a case that had not been issued at the time of this appeal, the Board found that good cause will exist where a party demonstrates that he suffered from an illness that affected his ability to file on time. *See Lacy v. Department of the Navy*, MSPB Docket No. SF-0752-97-0367-I-1, slip op. at 3-4 (June 2, 1998). To establish that an untimely filing was the result of an illness, the party must: (1) identify the time period during which he suffered from the illness; (2) submit medical evidence showing that he suffered from the alleged illness during that time period; and (3) explain how the illness prevented him from timely filing his appeal or a request for an extension of time. *Id.* If no medical reports are submitted, the appellant must explain the reasons for the lack of supporting medical evidence, and the administrative judge shall take those reasons into account when he evaluates the evidence submitted by the appellant. *Id.* at 4.

¶12 In this case, the pro se appellant alleged in his response to the administrative judge's acknowledgment order that his filing was untimely due to his mental health. *See* IAF, Vol. 1, Tab 3. When, as here, an appellant has stated that the reason for a filing delay is physical or mental illness, he must receive explicit information regarding the legal standard for establishing good cause on that basis, and he must be afforded a fair opportunity to submit evidence and argument to show that he met that standard. *See Lacy* at 4. Here, because *Lacy* had not yet been issued, the acknowledgment order did not specify the three requirements for establishing good cause for a filing delay based on an illness. *Id.*, Tab 2. Thus, we find that the appellant was not informed of the specific criteria he was required to allege to show good cause for waiver of the Board's time limit on the basis of illness. *See Hamilton v. Merit Systems Protection Board*, 75 F.3d 639 (Fed. Cir. 1996) (finding that "[a]n appellant cannot be expected to fight a fog of generality," but must be given a "full and fair opportunity to litigate the [timeliness] issue").

¶13 Accordingly, we remand the appeal to the regional office so that the administrative judge may provide the appellant with proper notice and a meaningful opportunity to file evidence and argument on the timeliness issue. On remand, evidence and argument will be limited to the issue of whether the appellant's alleged illness caused the delay in filing his appeal. If good cause is found, the administrative judge shall address the jurisdictional question presented by the appeal.

¶14 In remanding, we find that the appellant's claim of judicial bias is without merit since it was not based on extrajudicial conduct. *See Mitchell v. Department of Treasury*, 68 M.S.P.R. 504, 508 (1995) (finding that a party claiming bias must show that it constitutes extrajudicial conduct, not conduct arising in administrative proceedings before an administrative judge).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.